

BRETT JOHNSON,)	Case No.: 12-CV-03691-LHK
)	
Plaintiff,)	
v.)	ORDER GRANTING DEFENDANTS'
)	MOTIONS FOR SUMMARY
SAN BENITO COUNTY, et. al.,)	JUDGMENT
)	
Defendants.)	

I. BACKGROUND

Plaintiff Brett Johnson is a San Jose police officer and a father of four. ECF No. 50-1 (“Johnson Decl.”) ¶¶ 13-16. He brings this case pursuant to 42 U.S.C. § 1983 against two San Benito County Sheriff’s Department Officers, Undersheriff Patrick Turturici and Sergeant Tony Lamonica (collectively, “Officer Defendants”), along with the County of San Benito. ECF No. 1.

1

Plaintiff alleges that Officer Defendants engaged in a conspiracy that resulted in the deprivation of Plaintiff's constitutional rights by leading to the filing of false charges against Plaintiff. *Id.* ¶¶ 38-45.

Plaintiff posits that the central feature of the conspiracy was a quid pro quo agreement between Turturici and Plaintiff's ex-wife's new husband, Mike Howard ("Mike"), a prominent local businessman. *Id.* ¶ 31. Under this agreement, Mike would support Turturici in his competitive election to become sheriff of San Benito County, and in exchange, Turturici would use his authority as Undersheriff to cook up a false charge of child abuse against Plaintiff. ECF No. 50 at 2-3. This false charge would benefit Mike, because it would have the effect of altering Plaintiff's child support agreement with Plaintiff's ex-wife Mary Howard ("Mary"). This change would allow Mary (and therefore Mike) to receive increased child support. *Id.* at 12. Another effect of this agreement, according to Plaintiff, was that it would adversely affect Plaintiff's career in law enforcement and Plaintiff's ability to maintain future familial relationships. *Id.* at 13.

Understanding the conspiracy that Plaintiff alleges requires a brief overview of the individuals who form its crucial links:

- **Undersheriff Turturici:** Turturici was running for sheriff at the time of the incident. ECF No. 1 ¶ 24. Turturici's campaign involved threats of adverse consequences to those who did not support him and promises of rewards to those who supported his campaign. ECF No. 50-2 ("Scott Decl."), Ex. 29. Turturici's campaign is central to the alleged conspiracy. Complaints regarding Turturici's conduct during the campaign led to an internal investigation, which found that "there have been legitimate and corroborated incidents of inappropriate behavior and misconduct on the part of Undersheriff Turturici." *Id.* at 37. Nevertheless, the investigation made no formal findings on any alleged wrongdoing. *Id.* at 38.
- **Sergeant Lamonica:** Lamonica, an officer in the Sheriff's Office, was a Turturici supporter and loyalist who had been promised a promotion if Turturici was elected sheriff. *Id.*; Scott Decl., Ex. 19 ("Williams Depo.") at 125.
- **Mary Howard:** Mary is Plaintiff's ex-wife. She began working for and then dating Mike Howard. Scott Decl, Ex. 22 ("Mary Depo.") at 63-65. This relationship matured into a cohabitative, and ultimately, marital relationship. *Id.* Mary and Plaintiff shared joint physical and legal custody of their four children, but that custody arrangement changed as a result of the conduct at issue in this case. Johnson Decl. ¶ 14.
- **Mike Howard:** Mike owns the Tres Pinos Inn, a popular local business in San Benito County. Mike Howard's father supported Turturici for Sheriff. Johnson Decl. ¶ 27. Mike himself, however, did not contribute to or support Turturici's campaign. ECF No. 42 ("Davis Decl."), Ex. D ("Mike Depo."), at 89. Mike and Turturici lived on the same street for a period of time and were randomly paired

together during a charity golf tournament a half a decade ago. *Id.*; Scott Decl., Ex. 26 (“Turturici Depo.”) at 152-54.

- **William Tiffany:** Tiffany is a lawyer with whom Mary consulted during her divorce from Plaintiff. Mary did not retain him at that time. Mary Depo. at 123-24. However, Mary did hire him shortly after the allegations that form the basis for this action. *Id.* at 125.
- **Dan Devries:** Devries is a local attorney and a friend of Mike Howard. Scott Decl., Ex. 24 (“Devries Depo.”) at 10-14. He is involved in a number of community activities, including publication of a local newspaper. *Id.* at 16. He also has ties to Tiffany and Turturici. *Id.* at 17-19.
- **Karen Forcum:** Forcum is the deputy district attorney in San Benito County that prosecuted Plaintiff. Scott Decl., Ex. 21 (“Forcum Decl.”) at 26.

B. Incident

This case results in large part from an incident on July 17, 2010, when Plaintiff and his youngest son, who was fourteen years old at the time, got into an argument that ultimately turned violent. Scott Decl., Ex. 2, at 1. On the day of the incident, Plaintiff’s youngest son and youngest daughter were in Plaintiff’s custody. *Id.* at 14. The youngest son refused to get out of bed to go run an errand. *Id.* As a result, Plaintiff and the son got into an argument. *Id.* Events became physical when Plaintiff grabbed his son’s arm to pull the son out of bed. *Id.* The son then started flailing his arms. *Id.* at 18. As a result, Plaintiff told his son to stop, and when his son did not stop, Plaintiff pushed the son against the dresser in the room. *Id.* At this point, Plaintiff instructed his son to complete some chores outdoors. *Id.* Once outside, Plaintiff felt his son was not following instructions. *Id.* Plaintiff and his son began to argue again, and at that point, Plaintiff’s son ran to a neighbor’s house. *Id.*

Plaintiff was upset because the family was late to run the errand. His son, meanwhile, had asked the neighbor, Bob Coffert (“Bob”), whether he could use a phone to call his mother. *Id.* at 15. Bob agreed, and Plaintiff’s son went into a small laundry room in the Coffert residence and called his mother. *Id.* At this point, Plaintiff was still back at Plaintiff’s residence preparing his vehicle to run the errand. *Id.* at 18. After that task was complete, Plaintiff came to the Coffert residence to retrieve his son. *Id.*

At the Coffert residence, Plaintiff asked his son to hang up the telephone since they were running late. The son refused and stated that he would not accompany Plaintiff on the errand. *Id.* At this point, Plaintiff grabbed his son’s arm, took the phone, and hung up. *Id.* Plaintiff’s son resisted

1 by dropping to the floor and laying limp. *Id.* Plaintiff put his son's arm behind his son's back in
2 some sort of arm lock and placed his knee on his son's back. *Id.* at 15. Plaintiff finally picked his
3 son up off the floor and carried him outside the door. *Id.* at 18. Plaintiff and his son continued to
4 argue throughout this incident. *Id.* Once Plaintiff's son was in the passenger seat of the car, the son
5 allegedly made derogatory comments about Plaintiff. *Id.*

6 At this point, the facts accounted by Plaintiff diverge from those accounted by his son.
7 Plaintiff claims that he raised his hand to slap his son to punish the son for making the derogatory
8 comment, but that before Plaintiff could do anything, his son moved his head and hit it against the
9 window. *Id.* Plaintiff's son in contrast claims that Plaintiff slapped him with an open hand, despite
10 the fact that the son was sitting mute because he did not want to speak to his father. *Id.* at 15.
11 Plaintiff's son claims that the slap caused him pain because it hit a tooth, and that before his father
12 slapped him, he noticed blood under his nose resulting from the scuffle inside the Coffert house. *Id.*

13 Both Plaintiff and his son agree that the remainder of the drive to run the errand was
14 uneventful. After they returned home, Plaintiff asked his son to pack up the son's belongings and to
15 return to his mother's residence. *Id.* Plaintiff's son did so, and Mary came and picked Plaintiff's
16 son up from Plaintiff's residence. *Id.* Plaintiff's son told Mary about the physical altercation
17 between Plaintiff and Plaintiff's son. *Id.* At this point, Mary called the San Benito County Sheriff's
18 Office to report the incident. *Id.* at 14.

19 **C. First Investigation**

20 Deputy Marc Williams responded to the call, and he contacted his supervisor Sergeant Rick
21 Uribe because the suspect, Plaintiff, was a police officer. Serverian Decl., Ex. F ("Williams
22 Depo.") at 44-45. Uribe therefore joined Williams at Mary's residence. Scott Decl., Ex. 20 ("Uribe
23 Depo.") at 40-41. Williams first interviewed Mary, who reported her family history and told
24 Williams that the younger daughter was still with Plaintiff. Scott Decl., Ex. 2, at 14. Williams
25 offered to request medical assistance for the son, but both Mary and the son refused. *Id.* Williams
26 then interviewed the son, who reported his version of the incident. *Id.* at 14-16. Williams
27 photographed the son's injuries, which included scratches and red marks on the son's body. *Id.* at
28 15. Williams instructed Mary that because of the existing custody order, Plaintiff could insist that

1 the son be returned to Plaintiff and that the daughter not be released from Plaintiff's custody. *Id.* at
2 16. Accordingly, Williams recommended an emergency protective order ("EPO") to circumvent
3 the custody arrangement. *Id.* Mary requested an EPO. *Id.* Williams called a judge and informed the
4 judge of the circumstances. *Id.* The judge issued an EPO and ordered that Williams confiscate all
5 of Plaintiff's firearms. *Id.*; Scott Decl., Ex. 1.

6 While Williams was interviewing Mary and Plaintiff's son, Uribe was supervising. Uribe
7 Depo. at 42. Williams briefed Uribe, and Uribe asked if Williams had any questions. *Id.* at 41-42.
8 While Williams' interviews were ongoing, Uribe engaged in a small-talk conversation with Mike
9 about a trip Mike took to Idaho and Mike's forthcoming wedding. *Id.* at 42-44. Uribe and Mike did
10 not have any preexisting familiarity with each other. *Id.* at 44. During this time, Uribe was also
11 watching Williams interview Mary and Plaintiff's son. *Id.* at 45.

12 Williams and Uribe then interviewed Bob and Mary Lou Coffert ("Mary Lou"), Plaintiff's
13 neighbors whose house was the scene of much of the incident. Mary Lou told the officers that she
14 did not see any abusive conduct on Plaintiff's part. Scott Decl., Ex. 2, at 16. Bob stated that he had
15 heard a lot of yelling between Plaintiff and his son, during this incident and at other times. *Id.* at
16 17. But Bob stated that he had never seen Plaintiff act abusively with regard to Plaintiff's son. *Id.*

17 Williams next interviewed Plaintiff and Plaintiff's youngest daughter (who was a witness to
18 much of the incident and who was still with Plaintiff). Williams tape recorded his interview with
19 Plaintiff, in which Plaintiff informed the officers that his son routinely acted emotionally and
20 violently. *Id.* at 18-19; Uribe Depo. at 17. Plaintiff stated that his son had behavioral issues and that
21 Plaintiff, rather than Mary, was the disciplinarian parent. Scott Decl., Ex. 2 at 19. Plaintiff further
22 stated that his son had not reported any injuries resulting from the incident other than a tooth ache.
23 *Id.* Plaintiff's younger daughter essentially corroborated Plaintiff's statement, and stated that she
24 was not afraid of her father and that her father was not out of control when he was dealing with her
25 brother. *Id.* at 20.

26 After interviewing all the parties, Williams contacted the judge who issued the EPO and
27 asked the judge to suspend the EPO. *Id.* Williams offered two reasons for why he asked the judge
28 to suspend the EPO. First, Williams stated that the injuries to Plaintiff's son resulted more from

1 circumstance than intentional act and that as a result, Plaintiff was not going to be taken into
 2 custody. *Id.* Second, Williams stated that Plaintiff voluntarily agreed to suspend the custody
 3 arrangement and to allow Mary to maintain custody while the situation was resolved, thereby
 4 mooted the necessity of the EPO. *Id.* at 21. The judge declined to remove the EPO, but shortened
 5 its duration. *Id.*

6 In accordance with protocol, Williams drafted a report of his investigation of the incident,
 7 booked all seized firearms, completed a child abuse report form required by the state Department
 8 of Justice, in which he stated that the child abuse allegations were “inconclusive,” and downloaded
 9 all digital photos into the Sheriff’s Office case management system. *See generally id.* Williams’
 10 report recommended forwarding a copy of the report to the District Attorney’s office and to Child
 11 Protected Services for those agencies’ review. Plaintiff was not arrested, and no charges were filed.
 12 *Id.* at 21.

13 **D. Follow-Up Investigation, Charge, and Resolution**

14 A day or two after the incident, Mike and Mary got in touch with Turturici at the Sheriff’s
 15 Office to discuss the case. It is not clear who—Mike, Mary, or Turturici—made the initial call, but
 16 it is apparent that Mary ended up talking to Turturici.² In this conversation, Mary explained that
 17 she was concerned that the allegations against Plaintiff were not being taken as seriously as they
 18 should have been, perhaps because Plaintiff was a police officer. Mary Depo. at 101-04. After
 19 speaking with Mary, Turturici asked Lamonica to follow up on the case. Turturici Depo. at 86.

20 Lamonica reviewed Williams’ report from the initial investigation and concluded that
 21 further investigation was necessary. Lamonica Depo. at 88. Accordingly, Lamonica re-interviewed
 22 Plaintiff’s youngest son, who was injured in the incident, and Plaintiff’s youngest daughter, who
 23 was a witness to the incident. *Id.* He also interviewed Plaintiff’s two older children, who had no
 24 part in the incident, to determine whether there was any family history relevant to the incident. *Id.*
 25 Lamonica did not, however, re-interview Plaintiff himself, nor did he review the audio recording of
 26

27
 28 ² In her deposition, Mary could not clearly recall who called whom. Mary Depo. 96-100. It appears
 that Mike either called Turturici or got Turturici’s contact information from the sheriff. At that
 point, either Mary called Turturici or Turturici called Mary.

1 the initial interview with Plaintiff. *Id.* at 90-91. Rather, he relied exclusively on Williams' report
2 for information about the initial interview.

3 Lamonica prepared a supplemental report.³ Lamonica also changed Williams' DOJ child
4 abuse report from "inconclusive" to "substantiated." *Id.* at 122. Lamonica then forwarded both the
5 supplemental report and the revised DOJ child abuse report form to the District Attorney's office.
6 *Id.* There is no evidence in the record that Turturici either told Lamonica how to conduct the
7 investigation or otherwise participated in Lamonica's investigation. Johnson Depo. at 206
8 (acknowledging the lack of evidence of Turturici's involvement in the investigation beyond referral
9 to Lamonica).

10 Forcum, the Deputy District Attorney in charge of the case, received Williams' initial
11 report and Lamonica's supplemental report. Forcum Depo. at 34-37. Forcum further consulted
12 with the San Benito County Health and Human Services Agency. *Id.* at 36-37. An official at that
13 agency, after interviewing Plaintiff's youngest son and youngest daughter, concluded that "the
14 father is not guilty of physical abuse or emotional abuse as defined in the Welfare and Institutions
15 Code." ECF No. 50-7. Nevertheless, having reviewed the officers' reports, Forcum prepared and
16 filed a criminal complaint. Forcum Depo. at 43. Forcum contends that she did not rely on the DOJ
17 child abuse report form or on the audio recording of Williams' interview with Plaintiff in filing
18 criminal charges. *Id.* at 49, 51.

19 Plaintiff was arraigned. *Id.* at 54. He and his counsel were provided case materials prepared
20 by Officer Defendants and other San Benito Sheriff's Office employees. Johnson Depo. at 94. As
21 part of this material, Plaintiff was provided with a recording of Williams' interview with Plaintiff.
22 Forcum Depo. at 49. After reviewing these materials, Plaintiff agreed to attend a three-month
23 parenting class in exchange for the prosecutors' dropping of charges against him. Johnson Depo. at
24 97. Pursuant to this agreement, Plaintiff attended the classes, and the charges were dropped.
25 Forcum Depo. at 54-55.

26 After the charges were dropped, Plaintiff filed an internal affairs complaint against
27 Defendants alleging that the recording of Williams' interview with Plaintiff had been manipulated.
28

³ A full version of this report is not in the record. *See* Scott Decl., Ex. 8 (first page of the report).

1 Scott Decl., Ex. 13. Plaintiff submitted an expert report, which found irregularities in the recording.
2 Scott Decl., Ex. 14. Plaintiff contends that someone altered the recording to eliminate exculpatory
3 information. Scott Decl., Ex. 13 at 5. The state Department of Justice investigated Plaintiff's claim
4 and concluded that the recording had not been tampered with. Serverian Decl., Ex. H. Defendants
5 also retained another forensics expert, who like the state agency, concluded that there was no
6 evidence that the recording had been manipulated. Serverian Decl., Ex. I.

7 **E. Consequences**

8 Plaintiff contends that he has suffered adverse consequences resulting from the actions of
9 Officer Defendants in this case. Specifically, he contends that the charges in this case negatively
10 affected his current and future familial relationships and his career prospects.

11 With respect to his family, Plaintiff contends that a lawyer for his ex-wife Mary, William
12 Tiffany, sent him a letter during the pendency of the investigation in this case. Scott Decl., Ex. 7. In
13 that letter, which was sent four days after the incident, Tiffany stated that Mary objected to Plaintiff
14 having unsupervised visitation during a specific ten-day period with Plaintiff's youngest son due to
15 the allegations in this case. *Id.* The record does not contain any evidence that this letter
16 permanently affected Plaintiff's custody and visitation arrangement with Mary, and, in fact, with
17 respect to Plaintiff's youngest daughter, the custody arrangement has proceeded unchanged.
18 Johnson Depo. at 17.

19 Plaintiff further notes that he received paperwork from Child Support Services, indicating
20 that Plaintiff was responsible for more child support. Johnson Depo. at 132. Child Support Services
21 indicated that Plaintiff was responsible for the increased sum of child support because his youngest
22 son was now living full-time with Mary. *Id.* at 133. Plaintiff did not hire a lawyer or challenge this
23 new arrangement in family court; rather, he stipulated to the increase in the support payments. *Id.*
24 at 132, 135. Importantly, further, there is no evidence that changes to the custody agreement were
25 mandated by Defendants' actions in this case.

26 Plaintiff also contends that the events in this case have led to a longer term negative impact
27 on his ability to establish and maintain familial relationships. Specifically, Plaintiff has been placed
28 on the California Department of Justice's Child Abuse Central Index ("CACI") for having a

1 “substantiated” incidence of child abuse. Scott Decl., Ex. 9. Plaintiff claims that this placement
2 could adversely affect his ability to serve as a foster, step, or adoptive parent. Johnson Decl. ¶ 31.
3 Specifically, the San Benito County Sheriff’s Office, in a letter to Plaintiff explaining Plaintiff’s
4 Placement on CACI, stated that the “Index is accessed by law enforcement agencies, probation
5 departments, county welfare agencies and district attorneys when conducting investigation of child
6 abuse, and court investigators and licensing agency personnel to screen individuals for child
7 placement and licensure or employment positions having custody of children.” Scott Decl., Ex. 9.

8 With respect to his career, Plaintiff contends that he was placed on the *Brady* list by the
9 Santa Clara County District Attorney’s Office for having engaged in conduct that involved moral
10 turpitude. Scott Decl., Ex. 15. While Plaintiff contends that his placement on the *Brady* list could
11 adversely affect his career, including, for example, whether prosecutors are likely to allow him to
12 take the stand in cases that he investigates, there is no admissible evidence in the record explaining
13 the effect of being placed on the *Brady* list. Johnson Decl. ¶ 30. In his deposition, Plaintiff further
14 testified that he has suffered no actual adverse effects in his current job as a result of Defendants’
15 actions in this case. Johnson Depo. at 63.

16 **F. The Instant Litigation**

17 In light of these consequences, Plaintiff filed the instant lawsuit against San Benito County,
18 Turturici, and Lamonica. In his original Complaint filed on July 13, 2012, Plaintiff pleaded four 42
19 U.S.C. § 1983 causes of action, all of which were based on allegations of conspiracy to deprive
20 Plaintiff of his constitutional rights. ECF No. 1 at ¶¶ 38-53. Specifically, in his original complaint,
21 Plaintiff alleged that Defendants conspired to retaliate against Plaintiff in violation of the
22 Fourteenth Amendment, conspired to deprive Plaintiff of his equal protection rights by placing him
23 in a “class of one,” and conspired to cause a bad faith arrest that violated Defendants Fourth
24 Amendment rights. *Id.* ¶¶ 38-48. Plaintiff further alleged that San Benito County was liable
25 because it ratified Officer Defendants’ conduct. *Id.* ¶¶ 49-53.

26 On March 1, 2013, Plaintiff filed an amended complaint, which alleges five causes of action
27 under 42 U.S.C. § 1983. ECF No. 19. First, Plaintiff alleges that Defendants violated his
28 Fourteenth Amendment rights to due process by causing criminal charges to be filed against him.

1 *Id.* ¶¶ 39-42. Second, Plaintiff alleges that Defendants violated his equal protection rights. *Id.* ¶¶
 2 43-46. Third, Plaintiff alleges that Defendants violated the Fourth Amendment by causing a bad
 3 faith arrest. *Id.* ¶¶ 47-49. Fourth, Plaintiff alleges that Defendants violated the First Amendment by
 4 engaging in conduct designed to chill Plaintiff's rights to free speech and to petition the family
 5 court. *Id.* ¶¶ 50-55. Fifth, Plaintiff alleges municipal liability on the basis that San Benito County
 6 ratified Officer Defendants' conduct. *Id.* ¶¶ 56-60. The Amended Complaint further alleged that
 7 Officer Defendants were motivated by a conspiracy to deprive Plaintiff of his constitutional rights,
 8 but did not plead any conspiracy causes of action explicitly. *Id.* ¶¶ 42, 46, 49, 55.

9 On September 26, 2013, after the close of discovery, Turturici filed his Motion for
 10 Summary Judgment. *See* ECF No. 40. That same day, San Benito County and Lamonica filed a
 11 separate joint Motion for Summary Judgment. *See* ECF No. 43.⁴ On October 15, 2013, Plaintiff
 12 filed oppositions to both motions. *See* ECF Nos. 50-51.⁵ On October 22, 2013, Turturici filed a
 13 reply. *See* ECF No. 59. Lamonica and San Benito County also filed a reply that same day. *See* ECF
 14

15 ⁴ Both sets of Defendants also filed declarations and exhibits accompanying their Motions for
 16 Summary Judgment. Both sets of Defendants discovered that some of these exhibits contained
 17 sensitive information and move to remove these incorrectly filed documents from the docket. ECF
 18 Nos. 54-55. Plaintiff does not oppose this request, and Defendants have filed replacement exhibits.
 19 ECF Nos. 53, 57, 58. The Court GRANTS the motions to remove these documents. ECF Nos. 42-
 20 8, 42-10, 44. These entries shall remain locked. The Court has only considered the replacement
 21 exhibits in ruling on the Motions for Summary Judgment. *See* ECF Nos. 53, 57, 58.

22 ⁵ Plaintiff has filed two Administrative Motions to File Under Seal parts of Plaintiff's opposition to
 23 Defendants' Motions for Summary Judgment and one exhibit to the Declaration of John Houston
 24 Scott in support of Plaintiff's opposition. ECF Nos. 49, 52. The Court GRANTS Plaintiff's request
 25 to seal the exhibit attached to the Scott Declaration, which is the Internal Affairs Investigation
 26 Report. Scott Decl., Ex. 29. This Court finds that "compelling reasons" support the sealing of this
 27 document, which is a report on a non-public, internal employment investigation, much of which is
 28 not specifically relevant to the instant litigation. *See Kamakana v. City and Cnty. of Honolulu*, 447
 F.3d 1172, 1178-79 (9th Cir. 2006). Plaintiff shall e-file Exhibit 29 to the Scott Declaration under
 seal.

The Court DENIES Plaintiff's request to seal parts of his opposition. The information in the
 sentences that Plaintiff seeks to redact has already been publicly disclosed in this litigation. *See*
 ECF Nos. 26, 27, 29. The redacted portions of the opposition merely refer to the existence of the
 investigation and the broad outlines of what was investigated. *See* ECF No. 29 (explaining the
 relevance of these documents). The only specific findings of the investigation revealed in the
 opposition are directly related to the issues in these dispositive motions. Plaintiff has failed to set
 forth "compelling reasons" to seal this information. Accordingly, the Court finds that these are not
 sealable. Within five days of this order, Plaintiff shall e-file an unredacted version of the
 opposition. *See* ECF No. 51.

No. 60.

II. LEGAL STANDARD

Summary judgment is proper where the pleadings, discovery, and affidavits show that there is “no genuine dispute as to any material fact and [that] the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that may affect the outcome of the case. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See id.*

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323 (1986). Once the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and, by its own affidavits or discovery, “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). If the nonmoving party fails to make this showing, “the moving party is entitled to judgment as a matter of law.” *Celotex*, 477 U.S. at 323.

At the summary judgment stage, the Court must view the evidence in the light most favorable to the nonmoving party, and all reasonable inferences that may be drawn from the facts placed before a court must be drawn in favor of the opposing party. *See Stegall v. Citadel Broad., Inc.*, 350 F.3d 1061, 1065 (9th Cir. 2003). If evidence produced by the moving party conflicts with evidence produced by the nonmoving party, a court must assume the truth of the evidence set forth by the nonmoving party with respect to that fact. *See Leslie v. Grupo ICA*, 198 F.3d 1152, 1158 (9th Cir. 1999). However, “[b]ald assertions that genuine issues of material fact exist are insufficient.” *See Galen v. Cnty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007); *see also Day v. Sears Holdings Corp.*, No. 11-09068, 2013 WL 1010547, at *4 (C.D. Cal. Mar. 13, 2013) (“Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment.”). Further, a “motion for summary judgment may not be defeated . . . by evidence that is ‘merely colorable’ or ‘is not significantly probative.’” *Anderson*, 477 U.S. at 249-50; *see also Hardage v. CBS Broad. Inc.*, 427 F.3d 1177, 1183 (9th Cir. 2006) (same). If the

1 nonmoving party fails to produce evidence sufficient to create a genuine dispute of material fact,
 2 the moving party is entitled to summary judgment. *See Nissan Fire & Marine Ins. Co. v. Fritz*
 3 *Cos.*, 210 F.3d 1099, 1103 (9th Cir. 2000).

4 **III. DISCUSSION**

5 **A. Officer Defendants' Liability**

6 Plaintiff alleges that Officer Defendants deprived him of his First, Fourth, and Fourteenth
 7 Amendment rights and engaged in a conspiracy, the goal of which was to effectuate these
 8 deprivations. Specifically, in his opposition to the instant motions, Plaintiff contends that Officer
 9 Defendants contravened their constitutional obligations by conspiring to engage in conscience-
 10 shocking actions that (1) deprived Plaintiff of his substantive due process rights to pursue a career
 11 and engage in familial relationships, (2) deprived Plaintiff of his due process right to be free from
 12 the use of tampered evidence, (3) resulted in a bad faith seizure in violation of the Fourth
 13 Amendment, and (4) constituted retaliation that chilled Plaintiff's First Amendment rights of
 14 association and his right to petition the family court.⁶ ECF No. 51 at 19-22.

15 Officer Defendants' principal contention in the instant motions is that they are entitled to
 16 qualified immunity. "An officer is entitled to qualified immunity unless (1) facts viewed in the
 17 light most favorable to the injured party show that the officer violated a constitutional right and (2)
 18 the right was clearly established at the time of the alleged misconduct." *Ford v. City of Yakima*,
 19 706 F.3d 1188, 1192 (9th Cir. 2013). The inquiry focuses on whether Officer Defendants acted
 20 unreasonably—not whether they acted with malicious intent. As the Supreme Court has stated, "an
 21 allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively
 22 reasonable manner." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

23
 24
 25 ⁶ Although Plaintiff's Amended Complaint alleges an equal protection violation, neither
 26 Defendants' motions or replies nor Plaintiff's opposition address this cause of action. The Court
 27 notes that the equal protection claim would be meritless even if the claim had been properly argued
 28 in the briefs because Plaintiff has not marshaled any facts to suggest that those similarly situated to
 him were treated differently. *See McDonald v. Vill. of Winnetka*, 371 F.3d 992, 1001 (7th Cir.
 2004) ("A class of one equal protection claim may be brought where (1) the plaintiff alleges that he
 has been intentionally treated differently from others similarly situated and (2) that there is no
 rational basis for the difference in treatment or the cause of the differential treatment is a 'totally
 illegitimate animus' toward the plaintiff by the defendant.").

For the reasons stated below, the Court here finds that the Officer Defendants are entitled to qualified immunity because the facts, even when viewed in the light most favorable to Plaintiff, do not show that Officer Defendants violated any of Plaintiff's constitutional rights. Accordingly, the Court need not reach the issue of whether such rights were clearly established at the time of the misconduct.

Before the Court turns to each of Plaintiff's alleged constitutional violations to explain why these theories are not supported by the record, the Court notes the narrowness of Plaintiff's claims. Plaintiff only alleges wrongdoing by Turturici and Lamonica. It is undisputed that Turturici's sole action in the investigation that led to the instant litigation was asking Lamonica to conduct a second investigation. Johnson Depo. at 206, 211 (acknowledging lack of evidence regarding any further involvement by Turturici). Lamonica's role, while slightly more expansive, was also minimal. He re-interviewed Mary and Plaintiff's children, reviewed the first investigation, changed the designation of child abuse from "inconclusive" to "substantiated," and forwarded his revised report to the district attorney's office. Therefore, the crux of Plaintiff's case is a challenge to the fact that the case was re-investigated and a challenge to how that investigation was conducted.

The Court now turns to each of the bases on which Plaintiff contends that Officer Defendants' investigation infringed Plaintiff's constitutional rights. For the reasons discussed below, the Court finds that the facts in the light most favorable to Plaintiff do not show that Officer Defendants violated Plaintiff's constitutional rights.⁷ Accordingly, the Court grants summary judgment on the first prong of the qualified immunity analysis.⁸

1. Substantive Due Process

⁷ Because the Court finds that there is no underlying constitutional violation, Plaintiff's conspiracy allegations necessarily fail. As the Ninth Circuit has held, "[c]onspiracy is not itself a constitutional tort under § 1983," and conspiracy "does not enlarge the nature of the claims asserted by the plaintiff, as there must always be an underlying constitutional violation." *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 935 (9th Cir. 2012). The Court's finding that there is no constitutional violation therefore necessarily means that there is no claim for conspiracy.

⁸ Because the Court grants summary judgment on qualified immunity grounds, it need not reach Defendants' alternate contention that Plaintiff's claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994).

1 “Substantive due process protects individuals from arbitrary deprivation of their liberty by
2 government.” *Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006). The Ninth Circuit has stated
3 that “to establish a constitutional violation based on substantive due process, [a plaintiff] must
4 show both a deprivation of her liberty *and* conscience-shocking behavior by the government.” *Id.*
5 (emphasis added). For the reasons set forth below, the Court finds that Plaintiff has not marshaled
6 facts on the second of these two elements, whether Officer Defendants engaged in conscience-
7 shocking behavior. Accordingly, the Court need not reach the issue of whether there is sufficient
8 evidence to demonstrate that Officer Defendants deprived Plaintiff of constitutionally protected
9 liberty interests.

10 The Supreme Court has stated that “only the most egregious official conduct can be said to
11 be arbitrary in a constitutional way.” *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).
12 That inquiry requires the Court to look at whether Officer Defendants engaged in “conduct
13 intended to injure in some way *unjustifiable by any government interest*.” *Id.* at 849 (emphasis
14 added). Here, for the reasons stated below, the Court finds that there is no evidence that Officer
15 Defendants intended to injure Plaintiff in a manner that is unjustifiable by any government
16 interests. In fact, the evidence in the record suggests that Officer Defendants acted reasonably in
17 the course of their employment. As the Ninth Circuit has noted, where defendants act reasonably,
18 their actions cannot violate the more stringent shocks-the-conscience standard for a substantive due
19 process violation. *See Moreland v. Las Vegas Metropolitan Police Dept.*, 159 F.3d 365, 371 n. 4
20 (9th Cir. 1998) (noting that if defendants’ “actions were objectively reasonable, it follows that
21 [their] conduct did not offend the more stringent standard applicable to substantive due process
22 claims.”).

23 The undisputed facts suggest that Officer Defendants acted reasonably and that therefore
24 their conduct did not, as a matter of law, shock the conscience. Specifically, Turturici received a
25 call from a concerned mother, Mary, that allegations of child abuse were not being taken seriously.
26 Mary Depo. at 101-04. In response, Turturici asked Lamonica to take a second look at the case.
27 Turturici Depo. at 86. Lamonica reviewed the documents prepared in the scope of the first
28 investigation; conducted additional investigations that, in his experience, were warranted; and

1 reached the conclusion that Plaintiff engaged in unlawful conduct. Lamonica Depo. at 88. That
2 Lamonica reached a conclusion different than that reached by Williams after Williams' initial
3 investigation does not render Lamonica or Turturici's conduct unreasonable. A reasonable officer
4 could conclude from the facts of the incident and from Plaintiff's son's resulting injuries that there
5 was a substantiated claim of child abuse. This is all substantive due process requires. Plaintiff's
6 contention that Turturici and Lamonica's improper motives (*i.e.*, appeasing Mike to garner support
7 for Turturici's campaign) led to the conclusion that the child abuse allegations were substantiated is
8 immaterial. *Brittain*, 451 F.3d at 998. The critical question is not what motivated Turturici and
9 Lamonica in their conduct; rather, the question is whether such conduct was reasonable. *See id.*
10 Because the Court here concludes that Officer Defendants' conduct was reasonable, it need not
11 inquire into their motives. Instead, the finding of reasonableness is sufficient to conclude, as a
12 matter of law, that Officer Defendants cannot be liable for violation of Plaintiff's substantive due
13 process rights.

14 In finding as a matter of law that Officer Defendants did not act in an unreasonable manner
15 free from any legitimate government process, this Court finds that this case bears substantial
16 similarity to the Ninth Circuit's decision in *Brittain*. In *Brittain*, the Ninth Circuit, rejecting a
17 substantive due process challenge, granted summary judgment to a police officer on qualified
18 immunity grounds. There, the officer responded to a dispute between ex-spouses about which
19 spouse was entitled to custody at that moment. 451 F.3d at 986. The officer, after interviewing the
20 mother and reviewing the ambiguous custody agreement, ordered that the mother release the child
21 to the father. *Id.* at 986-87. The Ninth Circuit held that there the officer did not, as a matter of law,
22 engage in any conscience-shocking behavior. *Id.* at 996-97. The Ninth Circuit, after finding that the
23 officer's actions were a reasonable exercise of his statutory duties, found that the plaintiff's
24 evidence that the officer conspired with plaintiff's ex-husband was immaterial to its analysis of
25 whether the officer's conduct was conscience-shocking. *Id.* at 998. The Ninth Circuit stated that the
26 "conspiracy allegations all amount to issues of intent, which while disputed, are not relevant" to the
27 question of whether an officer's conduct shocks the conscience. *Id.* The Ninth Circuit similarly
28 found that plaintiff's evidence that defendant turned the tape recorder on and off while he was

1 interviewing plaintiff was irrelevant. *Id.* Finally, the Ninth Circuit rejected plaintiff's contention
2 that defendant's deviation from the usual practice of not requiring immediate transfer when there
3 was a custody dispute was immaterial to whether the officer's conduct shocked the conscience. *Id.*
4 The Ninth Circuit stated, "[i]t is not conscience shocking that an officer would act in a non-
5 identical fashion in cases presenting similar (though not identical) factual circumstances." *Id.*

6 Plaintiff's contentions that Officer Defendants engaged in conscience-shocking activities in
7 this case are strikingly similar to those rejected by the Ninth Circuit in *Brittain*. Plaintiff contends,
8 for example, that Mike and Mary conspired with Turturici and Lamonica to create the charges that
9 ultimately adversely affected Plaintiff's career and familial relationships. Yet, this is the precise
10 theory of conscience-shocking activity that the Ninth Circuit rejected in *Brittain*. *Id.* at 998. So
11 long as Turturici and Lamonica acted reasonably as law enforcement officers, their ill motives are
12 immaterial to whether their conduct shocked the conscience. Furthermore, Plaintiff appears to
13 contend that under the usual policies of the San Benito County Sheriff's Office, an officer would
14 not re-interview a witness without consulting the officer that did the initial report. Plaintiff asks the
15 Court to infer that Officer Defendants engaged in conscience-shocking conduct from Lamonica's
16 failure to follow this process by failing to consult with Williams before Lamonica's interview of
17 Mary, Plaintiff's youngest son, and Plaintiff's youngest daughter. ECF No. 50 at 11. Yet, as
18 discussed above, the Ninth Circuit has held that evidence of a deviation from routine practice or
19 policy is insufficient to survive a summary judgment motion. *Brittain*, 451 F.3d at 998. Finally,
20 Plaintiff here contends that the evidence of the tampering of the recording of Williams' interview
21 with Plaintiff is also probative of whether Officer Defendants engaged in conscience-shocking
22 behavior. As a preliminary matter, the record is not clear that Officer Defendants (or Forcum, the
23 prosecutor) actually relied upon the audio recording in making their decisions regarding
24 prosecution, or placement of Plaintiff on CACI and *Brady* lists. Furthermore, the Ninth Circuit in
25 *Brittain* held that manipulation of evidence cannot establish conscience-shocking activity, so long
26 as the officer acted reasonably. *Id.* Accordingly, Plaintiffs' contentions with respect to whether
27 Defendants acted in a manner that would shock the conscience are insufficient to create a genuine
28 issue of material fact on whether there was a substantive due process violation.

2. Tampered Evidence

Plaintiff next contends that Officer Defendants' actions deprived him of his right to be free from the use of tampered evidence. Specifically, Plaintiff contends that the altered recordings of Williams' interview with Plaintiff led to the filing of criminal charges against Plaintiff. "[T]here is a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." *Devereaux v. Abbey*, 263 F.3d 1070, 1074-75 (9th Cir. 2001). To support a deliberate fabrication of evidence claim, Plaintiff "must, at a minimum, point to evidence that supports at least one of the following two propositions: (1) Defendants continued their investigation of [Plaintiff] despite the fact that they knew or should have known that he was innocent; or (2) Defendants used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information." *Id.* at 1076 (emphasis in original); accord *Gantt v. City of Los Angeles*, 717 F.3d 702, 707 (9th Cir. 2013). To prove a deliberate fabrication of evidence claim, a plaintiff must show that the tampering caused harm to the plaintiff. See *McSherry v. City of Long Beach*, 583 F.3d 1129, 1136-47 (9th Cir. 2009). As such, if the ultimate decisions that caused Plaintiff harm were unrelated to the allegedly tampered evidence, then Plaintiff has no actionable section 1983 claim against those who tampered with the evidence. *Id.* at 1142. There must be facts that Officer Defendants relied on the tampered evidence and not on independent evidence in making their decisions that adversely affected Plaintiff. *Id.* at 1146-47.⁹

This record lacks such evidence. Even if there had been tampering with the recording of Plaintiff's interview with Williams, there are no facts that suggest that the tampered evidence led to any adverse consequences for the Plaintiff. Plaintiff contends that Officer Defendants' actions put Plaintiff on the *Brady* List, altered his CACI designation from "inconclusive" to "substantiated," and led to his booking and charge for child abuse. ECF No. 51 at 12-15. Yet, there is no factual evidence in the record that Officer Defendants reviewed the allegedly tampered audio tape before

⁹ The Ninth Circuit has also held that a defendant's conduct must shock the conscience for a plaintiff to bring a deliberate fabrication of evidence claim. See *Gantt*, 717 F.3d at 707. Therefore, the Court's discussion above with respect to Plaintiff's failure, as a matter of law, to establish that Defendants' conduct shocked the conscience also proves fatal to Plaintiff's deliberate fabrication of evidence claim.

1 taking these actions. To the contrary, Lamonica, the Defendant who conducted the second
2 investigation, testified that he never reviewed the audio recording of Williams' interview with
3 Plaintiff. Lamonica Depo. at 91 ("Q: Did you listen to that interview? A: No, I did not.").
4 Furthermore, Forcum, the prosecutor who made the decision to press forward with the criminal
5 charges against Johnson, also did not review this tape, but rather relied on her own separate
6 investigation. Forcum Depo. at 49 ("Q: Did you ever listen to the tape? A: No, I had a very -- I
7 relied on the police report, which had the statements of the witnesses in the report."). This evidence
8 is undisputed. Plaintiff has presented no facts to suggest that the purportedly doctored recording
9 was used in any way, by Defendants, Forcum, or anyone else. *McSherry*, 584 F.3d at 1146-47
10 ("The record is devoid of any information, facts, or valid inferences that might undermine [the
11 testimony that the tampered evidence was not relied upon].").

12 In light of the fact that the record is devoid of evidence of a causal nexus between the
13 tampering of the evidence and any of the tangible harms Plaintiff purportedly suffered, the Court
14 finds that Plaintiff's tampering of evidence claim cannot be a valid basis on which to proceed on a
15 due process claim.

16 3. Bad Faith Seizure

17 Plaintiff claims that Officer Defendants engaged in a bad faith seizure through a false
18 arrest. ECF No. 51 at 21. Specifically, Plaintiff appears to contend that Officer Defendants'
19 investigation led to the improper arrest and booking of Plaintiff. *Id.* An arrest need only be
20 supported by probable cause to be constitutional under the Fourth Amendment. *Michigan v.*
21 *DeFillippo*, 443 U.S. 31, 36 (1979). Probable cause determinations are wholly objective and are
22 based on the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983).
23 Accordingly, an individual officer's state of mind or intent is irrelevant to whether there was
24 probable cause. *See Whren v. United States*, 517 U.S. 806 (1996).

25 In this case, the Court finds, as a matter of law, that there was probable cause to arrest and
26 charge Plaintiff for child abuse. A reasonable officer could have concluded that Plaintiff engaged
27 in conduct that would constitute child abuse. The California statute that Plaintiff was alleged to
28 have violated states that "[a]ny person who willfully inflicts upon a child any cruel or inhuman

corporal punishment or an injury resulting in a traumatic condition is guilty.” Cal. Penal Code. § 273d(a); Scott Decl., Ex. 10. In this case, there was sufficient evidence for a reasonable officer to conclude that Plaintiff had violated this statute. Specifically, there is no dispute that Plaintiff and his son were engaged in a physical, violent encounter. Scott Decl., Ex. 2. This encounter involved Plaintiff pushing his son into a dresser, pinning down his son with his knee placed on his son’s back while holding his son’s arm behind his son’s back, and slapping or threatening to slap his son. *Id.* at 15, 18; ECF No. 50-7 (Stipulated Fact). Further, there is no dispute that Plaintiff’s son was injured, including sustaining scratches and small red marks on his body resulting from the incident. Scott Decl., Ex. 2, at 15; Scott Decl., Ex. 4; Williams Depo. at 50-51. In light of these facts, the Court finds that a reasonable officer would have had probable cause to conclude that Plaintiff had violated California law.

4. First Amendment

Plaintiff’s final theory of constitutional violation is that Turturici and Lamonica’s actions chilled Plaintiff’s First Amendment right to associate and petition the family court. ECF No. 51 at 21-22. Plaintiff must demonstrate two elements to show that Officer Defendants violated his First Amendment rights: first, Plaintiff’s “evidence must demonstrate that the officers’ conduct would chill a person of ordinary firmness from future First Amendment activity” and second, “the evidence must enable [Plaintiff] ultimately to prove that the officers’ desire to chill his speech was a but-for cause of their allegedly unlawful conduct.” *Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th Cir. 2013).

In this case, the Court finds that the evidence is insufficient for Plaintiff to ultimately establish the second element, that the desire to chill speech was the but-for cause of Officer Defendants’ actions. As a preliminary matter, the Court notes that in the cases in which the Ninth Circuit has found summary judgment inappropriate on a First Amendment theory, defendants have taken action in response to plaintiffs’ engaging in First Amendment activity. *See id.*; *Lacey*, 693 F.3d at 917; *Soranno’s Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989). In contrast, in this case, Plaintiff does not contend that he was engaging in any sort of First Amendment activity before Officer Defendants engaged in their allegedly unlawful actions. Rather, Plaintiff’s theory

1 focuses solely on the impact of Officer Defendants' actions on Plaintiff's future First Amendment
2 activity.

3 The record is devoid of evidence from which a fact-finder could infer that preventing
4 Plaintiff from petitioning the family court was a but-for cause of Officer Defendants' investigation
5 of Plaintiff. *See Corales v. Bennett*, 567 F.3d 554, 568 (9th Cir. 2009). There is no evidence that
6 Officer Defendants knew of the details of Plaintiff's custody arrangement with Mary or had any
7 desire to affect Plaintiff's rights to petition the family court to modify that arrangement. The only
8 link that Plaintiff suggests is that Mike and Mary Howard communicated information about their
9 financial status and custody arrangement to Officer Defendants. ECF No. 51 at 9-12. Yet, there is
10 no evidence that Mike or Mary communicated this information to Officer Defendants. In fact, Mike
11 has testified that he did not even know the nature of Mary's custody arrangement with Plaintiff.
12 Mike Depo. at 106. Because there is no record evidence that Officer Defendants even knew about
13 the custody arrangement, the Court finds that Officer Defendants could not have undertaken the
14 actions in this case for the purpose of preventing Plaintiff from vindicating his right to petition the
15 court regarding the custody arrangement.¹⁰ Therefore, the Court finds that Plaintiff's First
16 Amendment theory fails as a matter of law.¹¹

17 **B. The County's Liability**

18 Plaintiff further contends that San Benito County is liable for the actions of Turturici and
19 Lamonica under the *Monell v. Department of Social Service of City of New York*, 436 U.S. 658
20 (1978), because the County ratified the actions of the Officer Defendants. *See* ECF No. 1 at ¶¶ 49-
21 53. The Court, however, need not address the question of whether municipal liability is appropriate
22

23 ¹⁰ Plaintiff was not ultimately deterred from petitioning the family courts. In fact, Plaintiff
24 stipulated to the increase in his child support after he concluded that the increased amount was
25 reasonable. Johnson Depo. at 134-35. While this fact is not dispositive, since the ultimate question
26 is whether Officer Defendants' conduct would have chilled a person of ordinary firmness from
First Amendment activity, *see Mendocino Env'tl. Ctr.*, 192 F.3d at 1300, the Court nevertheless
finds this fact relevant.

27 ¹¹ In addition, summary judgment is also appropriate because the absence of probable cause is an
28 essential element of a First Amendment retaliatory prosecution claim. *See Hartman v. Moore*, 547
U.S. 250 (2006). As discussed above, there was probable cause for the arrest and prosecution here.
Accordingly, Plaintiff's First Amendment retaliation claim would fail even if he could establish
but-for causation.

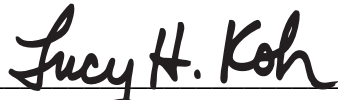
here under a ratification theory because the Court concludes that there are no facts supporting the contention that Turturici or Lamonica violated Plaintiff's constitutional rights.¹² *See Forrett v. Richardson*, 112 F.3d 416, 421 (9th Cir. 1997) ("Because we conclude that the officers did not violate [plaintiff's] constitutional rights, neither [the police chief] nor the City can be liable under section 1983."). Accordingly, the Court concludes that the County, like Officer Defendants, is entitled to summary judgment.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' Motions for Summary Judgment.

IT IS SO ORDERED.

Dated: December 3, 2013


 LUCY H. KOH
 United States District Judge

¹² Nevertheless, Plaintiff has not pointed to any facts in the record that establish that the actions of Turturici and Lamonica were ratified by an official with final policymaking authority (*i.e.*, the person who, as a matter of state law, had final policymaking authority and whose acts may fairly be said to represent official policy in the area of decision). *See Ulrich v. City & Cnty. of San Francisco*, 308 F.3d 968, 985 (9th Cir. 2002). At best, Plaintiff has contended that Turturici himself had significant authority due to the particularities of the Sheriff's Office. The Court finds that the record is devoid of facts to support this theory.